

) IN THE MARION CIRCUIT COURT

) SS:
) CAUSE NO. 49C01-0810-PL-049131

)
)
)
)
)
)
)
)
)
)
)

Plaintiffs,

V.

MARION COUNTY ELECTION BOARD,

Defendant.

FILED

258

DEC 14 2009

Charles A. White
CLERK OF THE MARION CIRCUIT COURT

CONSENT JUDGMENT

1. Findings. The Court hereby makes the following findings:
 - a. The Court has jurisdiction over this matter pursuant to the Indiana Supreme Court's March 3, 2009 remand order.
 - b. The Parties in this cause have executed the Settlement Agreement attached as an exhibit to this Consent Judgment and have stipulated to the resolution of their dispute in this cause and to the entry of this Consent Judgment. That Settlement Agreement is hereby incorporated by reference.
 - c. This Consent Judgment binds not only the Parties in this cause, but the Marion County Democratic Party, which is a major political party in Marion County under IC 3-5-2-30. The Marion County Democratic Party was not a party to this cause at the time of the Court's October 31, 2008 order and judgment, but with consent of the Parties and approval of the Court has intervened in this cause for the purposes of administration of remedy and is thus bound by this judgment.

d. Marion County is a populous county with more than 500,000 registered voters currently. A large number of voters in Marion County have voted in recent elections by absentee ballot.

e. Pursuant to IC 3-6-7, political parties and independent candidates may issue credentials to challengers, who may challenge voters who vote in-person on election day or who vote by absentee ballot and are not legal voters of the precinct. *See* IC 3-11-8-20, IC 3-11-10-21. The major political parties have issued challenger credentials, and challenges to voters' ballots by challengers and other election workers have occurred as recently as the November 2008 general election.

f. The election laws governing absentee ballot voting, challenging absentee ballots, issuing provisional ballots, and counting regular and provisional ballots are complex and highly technical. The record in this case demonstrates that voters and election workers are often confused about the requirements and procedures involved in absentee ballot voting and challenging. Trained election workers, informed voters, and political party representatives, acting in good faith, nonetheless are often unable to reconcile these legal requirements and procedures in a way that promotes the integrity of the voting process while not infringing voters' rights to cast their ballots and have them counted.

g. Absent certain clarifying instructions provided in this Consent Judgment and otherwise by the Marion County Election Board ("Election Board") and cooperation by the major political parties, this confusion is likely to persist to the detriment of the voting public.

2. October 31, 2008 Order. The Court's "Order on Complaint for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief" and accompanying entry of final judgment issued on October 31, 2008 is hereby **VACATED**.

3. Continuing Jurisdiction. Without affecting the finality of the Stipulation of Dismissal, the Court hereby reserves and retains continuing jurisdiction over all matters relating to the consummation of the Settlement Agreement and this Consent Judgment and any matters later found to be unresolved by the Settlement Agreement or this Consent Judgment.

4. Marion County Election Board Staff Appointments. Consistent with the their obligations as appointing authorities for the positions of Chair and Vice Chair of the Marion County Election Board under IC 3-6-5, the chairs of each major political party in Marion County shall be permitted to appoint an equal number of absentee ballot clerks to review all absentee ballot applications and absentee ballot envelopes received by mail prior to delivery of such absentee ballots for counting on election day. That review shall include, but not be limited to, the verification of signatures of absentee ballot voters as provided by law. *See* IC 3-11-10-4. The Election Board shall maintain its power to determine whether an absentee ballot envelope signature is genuine under IC 3-11-10-5 and IC 3-11-10-6 and the precinct board shall rule on the validity of any absentee ballot in dispute regarding the genuineness of the signature pursuant to IC 3-11-10-7. The Election Board shall maintain and provide to the major political parties a list of all absentee ballots for which notations are made to the precinct board under IC 3-11-10-5 and IC 3-11-10-6. The Director of Elections, or such other person designated by the Circuit Court Clerk, acting as Secretary of the Election Board, shall consult with the county chair of each major political party in advance of each primary, general, municipal, and referendum election regarding the total number absentee ballot clerks required for each such election and

receive and process the appointments of those clerks. Any absentee ballot clerk so appointed shall be otherwise qualified to be an employee or independent contractor of the Election Board.

5. In-Person Voting on Election Day. Nothing in this Consent Judgment shall alter or affect the duties of any election official with respect to in-person voting in any election.

6. In-Person Absentee Voting. Any absentee ballot cast at the Clerk's office pursuant to IC 3-11-10-26, a satellite voting facility pursuant to IC 3-11-10-26.3, or before a traveling board pursuant to IC 3-11-10-25 may, subject to the procedures and limitations in this Consent Judgment, be challenged at the polls pursuant to IC 3-11-10-21. In the event a proper challenge is made to any such in-person absentee ballot, the absentee ballot shall be placed in the ballot box only if the absentee voter's application for an absentee ballot is properly executed such that it shall be considered as the affidavit required by IC 3-11-10-22. Otherwise, in the event a proper challenge is made to any such in-person absentee ballot, such absentee ballot shall be treated as a provisional ballot and returned to the Election Board for further disposition under the provisions of election law and this Consent Judgment.

7. Absentee Voting by Mail. Any absentee ballot cast by mail, including military and overseas voters' ballots pursuant to IC 3-11-4-6 and 3-11-4-8, respectively, may, subject to the procedures and limitations in this Consent Judgment, be challenged at the polls pursuant to IC 3-11-10-21. In the event a proper challenge is made to any such absentee ballot cast by mail, such absentee ballot shall be treated as a provisional ballot and returned to the Election Board for further disposition under the provisions of election law and this Consent Judgment.

8. Challenge Procedures/Matters not Subject to Proper Challenge. Under IC 3-11-10-21, absentee ballots may be challenged at a precinct on election day solely for the "reason that the absentee voter is not a legal voter of the precinct where the ballot is being cast".

a. Challenges must be made by affidavit based on first-hand knowledge by a person with standing to challenge.

b. Pursuant to *April Herring et al. v. Marion County Election Board*, 49D11-0810-MI-047860 (Marion Superior Court, October 24, 2008), neither a voter's placement on a home foreclosure list or a voter's having received an eviction notice is alone a sufficient basis for challenge.

c. A purported failure of a signature match among the absentee ballot application, absentee ballot envelope and poll book is not in itself a basis for challenge that the absentee ballot voter is not a legal voter of the precinct, provided, however, that if the Election Board makes a notation to a precinct board with respect to the genuineness of a signature under IC 3-11-10-5 or IC 3-11-10-6, a properly documented challenge may be made solely upon that basis. Such a challenge based upon notation from the Election Board pursuant to IC 3-11-10-5 or IC 3-11-10-6 shall cause the ballot to be treated as a provisional ballot and returned to the Election Board for further disposition under the provisions of election law and this Consent Judgment. The Indiana Code contains other provisions governing the matching of absentee signatures by precinct inspectors. *See* IC 3-11-10-15.

9. Notice to Challenged Voters Whose Ballots Have Been Treated as Provisional Ballots. In providing notice to voters whose absentee ballots have been treated as provisional ballots because of a challenge, the Election Board shall comply with the requirements of IC 3-11.7-2-2(c) and IC 3-11.7-6-3 to the extent practicable. In addition, the Election Board shall attempt to provide actual notice (by mail and by such other means as may be available) to each

such voter and provide the voter an opportunity to be heard before the Election Board prior to its determination whether the voter's provisional ballot shall be counted.

10. Issuance of Challenger Credentials/Identity of Challengers. Challenger credentials shall only be issued to registered voters of the county who are qualified to serve as challengers pursuant to IC 3-6-7. Each political party or independent candidate intending to appoint challengers shall provide to the Election Board no later than 72 hours before the opening of the polls the name, voter's registration address and assigned precinct(s) of each person who will be appointed as a challenger except as otherwise authorized by the Election Board in its reasonable discretion. Only persons identified in conformance with this paragraph and qualified to be challengers shall be issued credentials and be permitted to serve as challengers in an election.

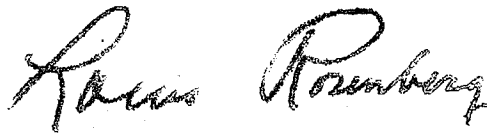
11. Required Instructions to Challengers. The Election Board shall discuss in a public meeting the requirements of this Consent Judgment and its procedures and requirements for challenging absentee ballots. In addition, for every primary, general, municipal and referendum election, the Election Board shall prepare written instructions to be distributed to all challengers at the time they receive their credentials. The instructions shall include the requirements to be a challenger, proper challenger procedures, and matters not subject to proper challenge as provided in this Consent Judgment. The Board shall also provide these instructions to members of each precinct board with the materials provided to the precinct inspector.

12. Maintaining List of Challenged Voters. The Election Board shall develop procedures to catalogue all challenges made to voters voting in-person on election day and to absentee ballots. The Election Board shall produce and maintain a list of challenged ballots, including for each challenged ballot the name of the challenger, the name of the challenged

voter, the precinct designation, whether the challenge resulted in the issuance of or treatment as a provisional ballot, and the reason stated for the challenge. The list shall be compiled timely to permit its use to provide the notices required by this Consent Judgment. The list shall be available for inspection and copying pursuant to IC 5-14-3. The list shall be submitted to a grand jury with the other materials provided under IC 3-14-5-2.

SO ORDERED.

DATED: **DEC 14 2009**



Judge Louis Rosenberg, Marion Circuit Court

Distribution:

David M. Brooks
A. Scott Chinn
Richard McDermott

SETTLEMENT AGREEMENT AND CONSENT JUDGMENT

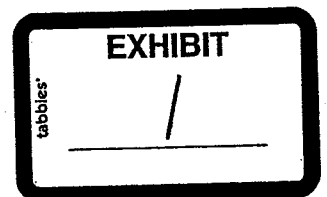
This Settlement Agreement and Consent Judgment ("Agreement") is made this 30th day of November, 2009, by and between Raymond J. Schoettle, Erica Pugh, and the Marion County Republican Party ("Plaintiffs") and the Marion County Election Board ("Election Board") (Plaintiffs and the Election Board together referred to herein as the "Parties"). This Agreement is premised upon the following recitals, which are incorporated into this Agreement:

RECITALS

1. A dispute has arisen between the Parties regarding the construction and operation of certain portions of the Indiana election code concerning challenges to voting by absentee ballot. The dispute includes the making of claims and defenses in a lawsuit presently pending in the Marion Circuit Court ("Trial Court") under the caption: *Raymond J. Schoettle, Erica Pugh, and the Marion County Republican Party v. Marion County Election Board*, Cause No. 49C01-0810-PL-049131 (the "Lawsuit") (the Lawsuit and related adversities between the Parties regarding legal provisions relating to challenges to voting by absentee ballot referred to herein as the "Dispute").

2. The background of the Dispute is as follows:

- a. This Lawsuit, which concerns the method for processing challenges to absentee ballots in the November 4, 2008 election, was filed on October 29, 2008. Plaintiffs were Raymond J. Schoettle, a voter; Erica Pugh, a candidate; and the Marion County Republican Party. The Marion County Election Board was the sole defendant.
- b. The Trial Court held a hearing on Plaintiffs' motion for preliminary injunction on October 31, 2008.



- c. Also on October 31, 2008, the Trial Court issued its decision, entitled "Order on Complaint for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief," ("October 31, 2008 Order") which included an injunction governing challenges to absentee ballots.
- d. The Trial Court's October 31, 2008 Order was issued as a final judgment.
- e. The Trial Court consolidated the hearing on the merits of the litigation with the preliminary injunction
- f. The Indiana Court of Appeals stayed the injunction on November 3, 2008, but Indiana Supreme Court granted transfer and denied the Election Board's motion to stay the injunction later that same day.
- g. Following the November 4, 2009 general election, on February 17, 2009, the Parties jointly stipulated to a request to the Indiana Supreme Court for remand of the Lawsuit to the Trial Court for further proceedings. On March 3, 2009, the Supreme Court granted that request for remand, stating in pertinent part: "the Court GRANTS the Corrected Motion to Remand, remands this case to the trial court without prejudice, and retains jurisdiction to the extent that any subsequent appeal of a final judgment in this case shall be to this Court."
- h. In its stipulation requesting the Supreme Court's remand order, the Parties pledged to work together with respect to case management, to attempt to stipulate to facts and narrowing the issues, and to "[t]o agree, if possible, to amendments to the trial court's injunction [the October 31, 2008 Order] to make the injunction clearer and more manageable." Following remand,

the Trial Court held a case management conference on May 6, 2009, following which the Parties submitted a joint case management plan that was approved by the Trial Court. And the Parties have met several times regarding potential resolution of the Dispute.

- i. The Parties have also stipulated to, among other things, a stay of the October 31, 2008 Order pending further decision of the Trial Court, which stay was ordered by the Trial Court on May 14, 2009.

3. The Parties, after consultation with their respective counsel, have concluded that it is in each of their best interests to compromise and settle the Dispute upon the terms and in the manner provided in this Agreement.

4. In addition, because it is a virtual certainty that disputes will continue to arise at each primary, general, municipal or special election regarding the proper treatment under the Indiana Election Code of challenged absentee ballots, the Parties desire to make this Agreement of record in the Lawsuit and to request that the Trial Court approve the Agreement and enter it as a consent judgment over which the Trial Court would have continuing jurisdiction ("Consent Judgment").

AGREEMENT

5. In conjunction with the execution of this Agreement, counsel for the Parties shall execute and file in the Lawsuit a Stipulation of Dismissal with Prejudice and tender to the Court a proposed Order of Dismissal, subject to the Trial Court's continuing jurisdiction as provided in the Consent Judgment.

6. Plaintiffs declare, warrant and represent that:

- a. Plaintiffs have not assigned nor transferred to any person, entity or party any claims that are the subject of this Agreement; and
- b. No promise, enticement or agreement not expressed in this Agreement has been made to Plaintiffs and that the terms of this Agreement are contractual and not merely a recital.

7. The Election Board declares, warrants and represents that:

- a. The Election Board has not assigned nor transferred to any person, entity or party any claims that are the subject of this Agreement; and
- b. No promise, enticement or agreement not expressed in this Agreement has been made to the Election Board and that the terms of this Agreement are contractual and not merely a recital.

8. Each Party shall bear its own costs and attorneys fees arising out of the Dispute and in connection with the drafting, negotiation and execution of this Agreement and neither Party shall seek to recover any of their costs and/or attorneys fees from any other Party in connection with the Dispute.

9. No waiver, modification nor amendment of any term, condition or provision of this Agreement shall be valid or have any force or effect unless (a) made in writing and signed by the Parties and (b) approved by the Trial Court if such modification alters the terms of the consent judgment or the effect of any of its provisions.

10. This Agreement reflects, among other things, the compromise and settlement of disputed claims. Neither this Agreement nor any document referred to in this Agreement, nor any action taken to carry out this Agreement, is, or may be construed as, or may be used as, an admission or concession by or against any Party on any point of fact or law, or of any alleged fault, wrongdoing, or liability whatsoever.

11. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Indiana.

12. Each of the covenants contained in this Agreement shall be binding upon and shall inure to the benefit of each of the respective Parties' assigns and successors-in-interest.

13. Plaintiffs acknowledge and declare that, in making this Agreement, they have relied solely upon their own or their counsel's judgment, belief, and knowledge of the nature and extent of any matters addressed in the Agreement, and have not relied upon any statement, representation, disclosure or nondisclosure by any other Party or any other Party's representatives, agents, attorneys or employees.

14. The Election Board acknowledges and declares that, in making this Agreement, it has relied solely upon its own or its counsel's judgment, belief, and knowledge of the nature and extent of any matters addressed in the Agreement, and has not relied upon any statement, representation, disclosure or nondisclosure by any other Party or any other Party's representatives, agents, attorneys or employees.

15. Each individual signing this Agreement on his or her own behalf or as an agent, officer or representative of a party to this Agreement hereby acknowledges that he or she has carefully read this entire Agreement and he or she or his or her principal understands its contents.

16. Each individual signing this Agreement on his or her own behalf or as an agent, officer or representative of a party to this lawsuit hereby acknowledges that he or she signed this Agreement with full knowledge of and appreciation of his or her actions, and with the advice of counsel.

17. The Parties acknowledge that each has had an equal opportunity to participate in the drafting of this Agreement. Therefore, in any construction or interpretation of this

Agreement, the Parties agree and understand that this Agreement shall not be construed against any Party on the basis of authorship.

18. Each individual signing this Agreement warrants that he or she has proper authorization to execute this Agreement, either personally or on behalf of his or her respective entity, and are of sound mind and legal age to sign this Agreement.

19. If any term or provision of this Agreement is declared to be invalid by a court of competent jurisdiction, or if any term or provision of this Agreement conflicts with any applicable state or federal law, such term or provision of this Agreement shall be severable from, and shall not affect the validity of, any other term or provision of this Agreement.

20. This Agreement represents the entire agreement between Plaintiffs and the Election Board, and it supersedes all prior negotiations, representations, or agreements, whether written or oral, between those Parties with respect to the Dispute.

21. Any Party may enforce this Agreement and its terms and conditions. As further provided by the Consent Judgment, the Parties hereby stipulate that the sole and exclusive venue for the resolution of any such enforcement action or other proceeding in connection with this Agreement is the Marion Circuit Court, Marion County, Indiana.

22. This Agreement may be executed in multiple counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument. Telecopied signature pages shall have the same legal impact and import as the original.

Plaintiffs

Marion County

By: [Signature] Republican Chairman

Date: 8/1/09

Marion County Election Board

By: _____

Printed: _____

Title: _____

Date: _____

Plaintiffs

By: _____

Date: _____

Marion County Election Board

By: Laurel S. Judkins

Printed: LAUREL S. JUDKINS

Title: DIRECTOR OF ELECTIONS - MCEB

Date: NOV. 25, 2009